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USINDOPACOM J06/SJA TACAID SERIES



TOPIC: LEGAL STATUS OF THE TAIWAN STRAIT

(COUNTERING THE PRC'S EXCESSIVE CLAIMS & REBUKE OF "INTERNATIONAL WATERS")

BLUF



- (U) The Taiwan Strait includes a corridor beyond the territorial sea (TTS) of any state in which all nations enjoy high-seas freedoms of navigation, overflight, and other internationally lawful uses of the sea and air.
- (U) The water and airspace in this corridor may be described as "international waters" and "international airspace", respectively.ⁱ The terms "international waters" and "international airspace" are commonly used to describe waters and airspace seaward of the TTS – including Contiguous Zone (CZ), Exclusive Economic Zone (EEZ), High Seas (HS), and superjacent airspace – which are not subject to any state's sovereignty
- (U) The right of *innocent passage*ⁱⁱ applies in portions of the Strait falling within lawful 12-nm TTS.ⁱⁱⁱ
- (U) The PRC's efforts to aggrandize its rights in the Strait while constraining the rights/freedoms of other nations – by claiming excessive sovereignty, jurisdiction, or control in the Strait – has no basis in international law.
- (U) By deprecating the term "international waters", the PRC aims to propagate a legal framework based principally in "sovereignty" and "jurisdiction," thereby undermining other nations' rights and freedoms.

WHY THIS MATTERS

- (U) The Taiwan Strait provides important freedom of maneuver and global mobility for the United States and the international community.
- (U) If left unchallenged, the PRC's rebuke of *international waters* and ambiguous claims of "sovereignty" and "jurisdiction" in the Strait could serve as pretext for future actions that disrupt the status quo vis-à-vis Taiwan or otherwise limit the international community's navigational rights/freedoms in the Strait.
- (U) OALs or statements involving the Taiwan Strait (e.g., KLEs, exercises, bi/multilateral engagements, public affairs) should reinforce: (a) the Strait encompasses a corridor of waters/airspace beyond TTS/national airspace; (b) high-seas freedoms of navigation, overflight, and other lawful uses apply in the corridor; (c) the corridor is not subject to PRC *sovereignty* (PRC cannot lawfully assert sovereignty beyond its lawful TTS); (e) the United States rejects any assertion of sovereignty or jurisdiction that is inconsistent w/ freedoms of navigation, overflight, and other lawful uses of the sea and air.

DETAILED DISCUSSION

- (U) **Geographic Characteristics of the Taiwan Strait.** The Strait is approx. 86-nm wide at its narrowest points. It connects the South and East China Seas and is used heavily for international navigation. Because of its width, portions of the Strait fall outside 12-nm TTS (as derived from lawful baselines) on either side of the Strait.
- (U) **"International Waters" and "International Airspace" Defined.** Though the term *international waters* does not appear in UNCLOS, it is commonly used/understood to refer to all ocean areas not subject to the sovereignty of any nation.^{iv} *International waters* include CZ, EEZ, and HS^v – zones/areas in which all nations enjoy high seas freedoms of navigation, overflight, and internationally lawful uses. Similarly, the term *international airspace* does not appear in UNCLOS or the Chicago Convention, but is commonly used/understood to describe airspace over CZs, EEZs, and HSs – airspace beyond national airspace and not subject to the *sovereignty* of any nation.^{vi}
- (U) **Application to Taiwan Strait: International Waters/Airspace Corridor.** The ~60-nm wide corridor in the Strait is beyond the lawful TTS of any coastal state consists of CZ/EEZ. As such, this corridor is appropriately

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characterized as *international waters/airspace*. The PRC’s objection to the term *international waters* is a gray-zone tactic to undermine the high-seas freedoms and other lawful uses this shorthand descriptor conveys.

- (U) **UNCLOS Provisions.**^{vii} Describing the corridor as *international waters* finds support in arts. 34, 36, 58, and 87, even though the term is not used explicitly in UNCLOS. These articles make clear the waters in the corridor retain their legal character as CZ/EEZ in which high seas freedoms of navigation and overflight apply (i.e., CZ/EEZ is not TTS or subject to coastal state *sovereignty* merely because they are in a strait).^{viii} The term *international waters* is thus a shorthand way to convey the import of these UNCLOS articles: the corridor is not *sovereign* waters and high-seas freedoms of navigation, overflight, and other lawful uses are guaranteed to the community of nations. In fact, the United Nations Division for Ocean Affairs and Law of the Sea notes that “UNCLOS reflects consensus on the line separating national [i.e., TTS] and *international waters* where all States can enjoy freedom of navigation.”^{ix} While true that the PRC has limited *sovereign rights* and *jurisdiction* in those portions of the Strait falling in its CZ/EEZ,^x UNCLOS makes abundantly clear those portions (outside lawful TTS) are not subject to its *sovereignty* or exclusive control. Any assertion/suggestion by the PRC otherwise is contrary to international law.
- (U) **Taiwan Strait “Centerline.”** The centerline is not a legally binding demarcation, but has served as a practical tool to prevent escalation. Tacit understanding between the PRC and Taiwan has resulted in limited centerline crossings.^{xi} The effects of U.S. action on the centerline’s continued utility are an important policy consideration.

• (U) **Quick Reference Chart: Navigational Rights/Freedoms and Coastal State Rights**

Portion of Strait Falling In Coastal State’s...	Legal Status	Navigational/Overflight Rights (all nations)	Coastal State Rights
CZ/EEZ (beyond 12-nm of coast or other lawful baseline)	Int’l Waters/Airspace (i.e., corridor of int’l waters)	- High seas freedom of navigation, overflight, & other lawful uses - Prior notice/permission of coastal State <i>not</i> required	- <i>Limited jurisdiction and rights</i> in CZ and EEZ - <i>Does not = sovereignty</i> beyond lawful TTS
TTS (w/i 12-nm of coast or other lawful baseline)	Sovereignty	- Innocent passage (ships, not aircraft) - Notice/permission of coastal State <i>not</i> required	- Sovereignty - But, <i>cannot</i> impede right of innocent passage

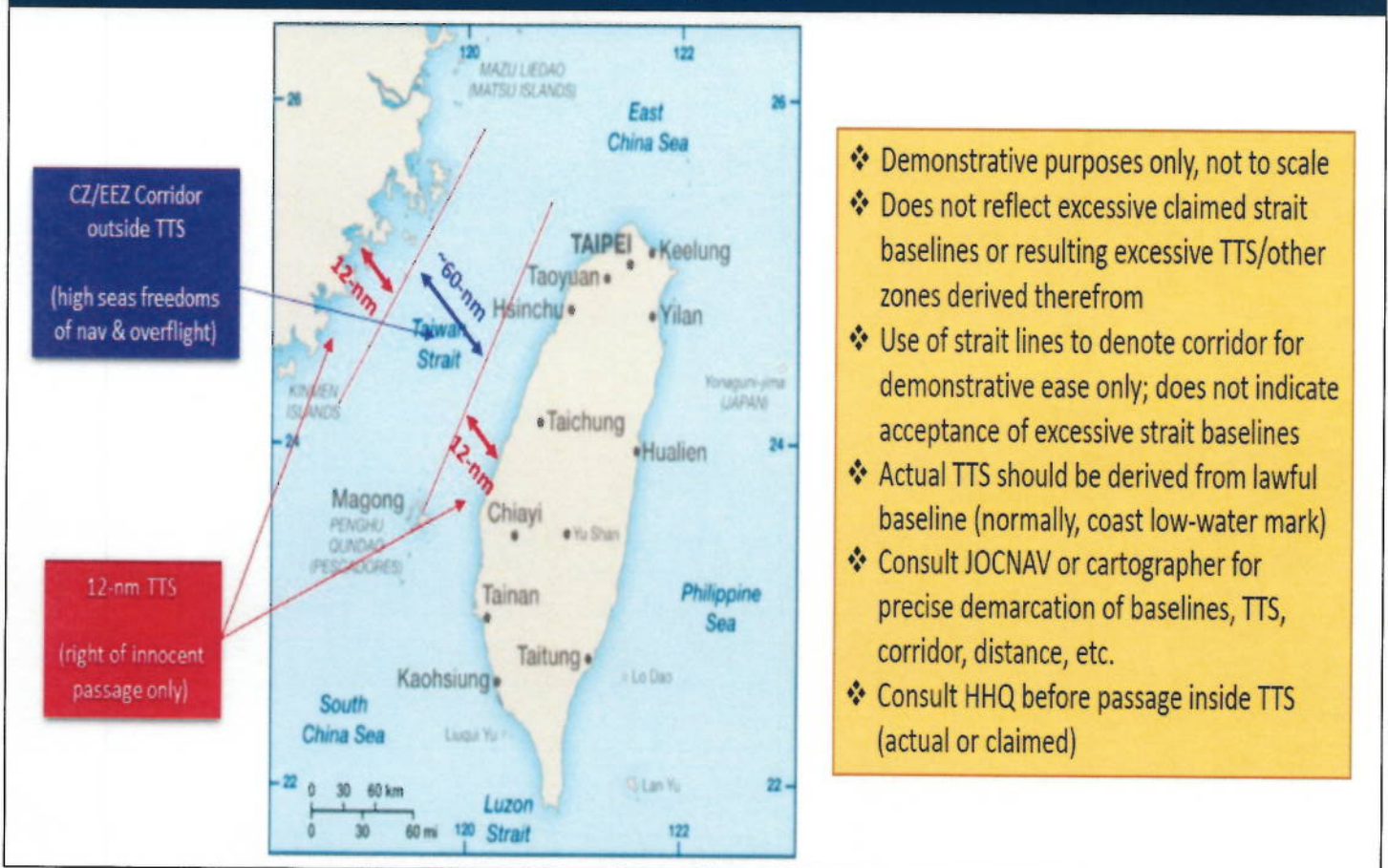
- (U) **The PRC’s Gray-Zone Approach in the Strait.** The PRC has not openly asserted *sovereignty* over the entire Strait. Rather, a PRC MFA spokesperson recently stated: “According to UNCLOS and Chinese laws, the waters of the Taiwan Strait, extending from both shores toward the middle of the Strait, are divided into several zones including internal waters, territorial sea, contiguous zone, and the Exclusive Economic Zone. China has sovereignty, sovereign rights and jurisdiction over the Taiwan Strait. At the same time, it respects the lawful rights of other countries in relevant waters.”^{xii} The MFA also objected to the term *international waters*, claiming it has no basis in international law.^{xiii} Like most PRC legal warfare, the MFA statement was carefully crafted and contains elements of truth. Within the Strait, the PRC *does* enjoy some “sovereignty” [portions falling in its lawful IWS & TTS], some “sovereign rights” [resource exploitation in EEZ], and some “jurisdiction” [limited beyond TTS to enforcement of CZ/EEZ rights]. It is also true the term *international waters* does not appear in UNCLOS. Yet, while there are elements of truth in the MFA’s statement, it should be considered in light of the PRC’s other ambiguous and excessive maritime claims, including for example its ill-defined “dash-line” claim,^{xiv} unlawful restrictions on military activities in its EEZ,^{xv} and claimed maritime jurisdiction that exceeds international law.^{xvi} Likewise, “sovereignty” and “jurisdiction” are principles that the PRC has applied excessively and in the context of the Strait, could serve as pretext for future actions that disrupt the status quo or limit the international community’s navigational and other rights/freedoms in the Strait.

PROPOSED COUNTER-LAWFARE NARRATIVE

- (U) The Taiwan Strait encompasses a corridor of waters and airspace beyond the territorial sea (TTS) and sovereign airspace of any coastal state. In this corridor, all nations enjoy high-seas freedoms of navigation, overflight, and other internationally lawful uses of the sea.

- (U) This corridor is appropriately described as *international waters/airspace* - commonly used and understood terms for waters and airspace beyond the TTS of any coastal state in which all nations enjoy high-seas freedoms of navigation, overflight, and other internationally lawful uses of the sea/air.^{xvii}
- (U) Although the term *international waters* does not appear in UNCLOS, it nevertheless is grounded in arts. 34, 36, 58, 87. These articles make clear that in the corridor of waters (CZ, EEZ) beyond lawful TTS all nations continue to enjoy high seas freedoms of navigation, overflight, and other internationally lawful uses of the sea.
- (U) The United States rejects any assertion by the PRC of *sovereignty over the entirety of the Strait or beyond its 12-nm TTS* and rejects any assertion of *excessive jurisdiction or control*, i.e. exceeding the limited CZ and EEZ jurisdiction or rights provided for by international law of the sea as reflected in UNCLOS.
- (U) The PRC's rebuke of the term *international waters* is a gray-zone tactic to advance an alternative narrative that undermines the navigational rights and freedoms afforded to all nations under international law.
- (U) The United States will continue to fly, sail, and operate anywhere international law allows (including in the Taiwan Strait) because doing so reinforces the navigational rights and freedoms of all nations and precludes any one nation from undermining those rights and freedoms.

GRAPHIC



ⁱ Although the terms *international waters/airspace* are commonly used, accurate, and appropriate descriptions, there may be times where a more nuanced, technical description *in lieu of or in addition to* these shorthand terms is recommended. This TACAID also provides that more technical description and some considerations for choosing an appropriate descriptor in a given situation.

ⁱⁱ There is no similar right of overflight over the TTS; innocent passage applies to vessels only.

- ⁱⁱⁱ The TTS as derived from lawful baselines. Of note, PRC claims excessive strait baselines in the Strait resulting in excessive IW and TTS claims as well. See DoS LIS No. 117 (Jul. 1996).
- ^{iv} NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, ¶ 1.5, 1.6; JP 3-32; 15 CFR 30.1; DoD LoW Manual, ¶ 13.2.2, 13.3.3; USCG Pub. 1; U.S. State Dep't Share America Website. For a sampling of non-U.S. use of the term, see, e.g., U.N. Div. Ocean Affairs, *Oceans: The Lifeline of Our Planet, Anniversary of UNCLOS* (website); UNSCRs 1801 (2008), 552 (1984); U.K. JSP 383; AUS ADDP 06.1, ¶ 06.4; Newport ROE Handbook (2022).
- ^v NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, ¶ 1.5, 1.6.
- ^{vi} ICAO Info Paper: *International Airspace and Civil/Military Cooperation*; UNSCR 1801 (2008); NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, ¶ 1.9, 2.7.2; JP 3-32; DoD LoW Manual ¶ 14.2.1 *et seq.*; DoDI 4540.01; U.K. JSP 383; AUS ADDP 06.4, ¶ 8.7; Newport ROE Handbook.
- ^{vii} Although not a party to UNCLOS, the United States considers the convention's navigation and overflight provisions reflective of customary international law.
- ^{viii} Compare: The more limited right of "transit passage," applicable to Straits completely *overlapped by TTS*, does not apply to the Taiwan Strait because of its width. See UNCLOS Art. 36.
- ^{ix} See website: U.N. Div. Ocean Affairs, *Oceans: The Lifeline of Our Planet, Anniversary of UNCLOS*.
- ^x A coastal state's rights and jurisdiction in its EEZ is limited to exploration and conservation of resources, and its jurisdiction in its CZ is limited to preventing customs, fiscal, immigration, and sanitation violations in its territory or territorial sea. Neither is for purported security purposes.
- ^{xi} See R. Pedrozo, *China's Threat of Force in the Taiwan Strait*, LAWFARE Blog (29 Sep 20).
- ^{xii} The statements were widely reported and posted on the PRC MFA website on 13 Jun 22.
- ^{xiii} *Id.*
- ^{xiv} See DoS LIS No. 143 (Sep. 2014); SCS Arb. Tribunal Award [PHL v. PRC] (12 Jul 16), pt. V.
- ^{xv} See USN *Maritime Claims Reference Manual*; USINDOPACOM OSJA, *Military Activities in the Exclusive Economic Zone*, 97 Int'l L. Stud. 45 (2021).
- ^{xvi} See, e.g., R. Pedrozo, *Maritime Police Law of the People's Republic of China*, 97 Int'l L. Stud. 465 (2021); R. Pedrozo, *China's Revised Maritime Traffic Safety Law*, 97 Int'l L. Stud. 956 (2021).
- ^{xvii} See note i above. Depending upon the situation, a more nuanced, technical description may be more appropriate in lieu of, or in addition to, this shorthand descriptor. A heavy defense of the term *international waters* may, in some situations, be a counterproductive distraction from the nuanced technical explanation of rights and freedoms guaranteed to all nations in the Strait.